

Matter of AKF Inc. v Jin Clothing, Inc.

2023 NY Slip Op 34530(U)

December 21, 2023

Supreme Court, New York County

Docket Number: Index No. 653384/2023

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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In the Matter of

AKF INC., doing business as FUNDKITE,

Petitioner,

- v -

JIN CLOTHING, INC., DEBBIE C. SIM, and ANTHONY YUN
SIM,

Respondent.

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INDEX NO. 653384/2023

MOTION DATE 08/22/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

This is a proceeding pursuant to CPLR 6301, 6312(a), and 7502(c), in which the petitioner moves for a preliminary injunction in aid of arbitration to restrain respondents' bank accounts, pending an award in the underlying arbitration. Although the respondents do not oppose the motion, it nonetheless is denied.

On January 19, 2023, the petitioner entered into an agreement with the respondent Jin Clothing, Inc. (JCI), pursuant to which the petitioner agreed to purchase \$352,820.00 of JCI's future receivables for the sum of \$271,400.00, less service fees in the sum of \$11,041.00, in consideration for JCI's future repayment of that sum plus 13% in annual interest. The agreement presumed a weekly "delivery" amount of \$11,025.63 from JCI's receivables via an automatic debit from JCI's bank account, with a monthly reconciliation. The respondents Debbie C. Sim and Anthony Yun Sim guaranteed JCI's obligations under the agreement. The agreement provided for arbitration of any dispute under the agreement, including claims that JCI breached the agreement by failing to pay its weekly delivery.

The petitioner alleged in its petition that, from May 19, 2023 to May 30, 2023, and again from June 16, 2023 to June 30, 2023, JCI's scheduled weekly debit of receivables from its designated bank account was declined because of insufficient funds. In addition, it asserted that, on July 7, 2023, it received a notice from JCI's bank that its scheduled weekly debit of receipts from the designated account was declined because "Payment Stopped." The petitioner further asserted that JCI did not inform it whether the bank account had been closed, nor did JCI attempt to demonstrate any supposed downturn in the amount of its weekly receivables, as would have been permitted under the agreement. Neither, according to the petitioner, did JCI restore its receivables back into that account to permit the petitioner to continue to receive weekly payments. Rather, the petitioner alleged that it believed that JCI's principals began "diverting" JCI's receipts into other accounts.

The petitioner commenced this CPLR article 75 proceeding on July 13, 2023. In the initiatory order show cause, this court, pending hearing of the petition, temporarily restrained the respondents from transferring money out of their bank accounts, and restrained Open Bank, as JCI's designated bank, from transferring money out of any of the respondents' accounts that were maintained at that bank. The petitioner properly served the respondents in accordance with the method to which they consented in the underlying agreement, which was memorialized in the order to show cause. On August 17, 2023, the petitioner ultimately served its demand for arbitration of its claim for \$241,112.88 against the respondents before Civil Arbitration Inc., doing business as Rapid Ruling, an arbitral forum located in Manhattan. The respondents failed to respond to the demand or appear at the arbitration hearing. In an award dated October 7, 2023, the arbitrator awarded the petitioner the principals sum of \$241,787.88, plus the costs of seeking judicial confirmation of the award, along with interest at 9% per annum from the date of the award.

To obtain a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury if a preliminary

injunction is not granted, and (3) a balance of equities in its favor (see CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Gliklad v Cherney*, 97 AD3d 401, 402 [1st Dept 2012]; *Gilliland v Acquafredda Enters., LLC*, 92 AD3d 19, 24 [1st Dept 2011]; *Spinale v 10 W. 66th St. Corp.*, 193 AD2d 431, 431 [1st Dept 1993]).

The petitioner not only demonstrated a likelihood of success on the merits of its underlying arbitration claims against JCI, but actual success. Nonetheless, inasmuch as the underlying arbitration was based upon allegations of JCI's nonpayment, the petitioner failed to demonstrate an irreparable injury, as its damages are compensable through monetary relief (see *Atlas MF Mezzanine Borrower, LLC v Macquarie Texas Loan Holder, LLC*, 174 AD3d 150, 156 [1st Dept 2019]; *Broadway 500 W. Monroe Mezz II LLC v Transwestern Mezzanine Realty Partners II, LLC*, 80 AD3d 483, 484 [1st Dept 2011]; *Matter of AKF, Inc. v Windows & Beyond Interiors, LLC*, 2023 NY Slip Op 34330[U], *3, 2023 NY Misc. LEXIS 23034, *4 [Sup Ct, N.Y. County, Dec. 11, 2023] [Kelley, J.]; *Matter of AKF, Inc. v Polonez Parcel Serv., LLC*, 2023 NY Slip Op 33055[U], 2023 NY Misc LEXIS 5346 [Sup Ct, N.Y. County, Aug. 21, 2023]). Nor has the petitioner demonstrated that JCI or its guarantors would be unable to satisfy a judgment against them without a preliminary injunction, as it has not established that JCI's account actually has been closed, or that JCI or its guarantors have no other assets that could be seized or levied upon to satisfy a judgment. The petitioner simply seeks to ensure that an arbitration award in its favor would be recoverable, which is not an adequate basis for prejudgment equitable relief (see *Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 548 [2000]; *Buckley v McAteer*, 210 AD3d 1044, 1045 [2d Dept 2022]; *Matter of AKF, Inc. v Windows & Beyond Interiors, LLC*, 2023 NY Slip Op 34330[U], *3, 2023 NY Misc. LEXIS 23034, *4; *Matter of AKF, Inc. v Polonez Parcel Serv., LLC*, 2023 NY Slip Op 33055[U]; cf. *Matter of Qwil PBC v Landow*, 180 AD3d 593, 593 [1st Dept 2020] [granting preliminary injunction in aid

of arbitration where petitioner established that respondents in fact discontinued the petitioner's access to their bank account and actually transferred significant funds to other accounts]).

The court notes that CPLR 7502(c) also allows a party to seek an order of attachment in aid of an arbitration, regardless whether the arbitration is for monetary damages, but that the petition does not seek attachment as alternative relief. Even if the petition may be construed as one for attachment, none of the respondents resides in New York, and Open Bank has its principal place of business in California. “The general rule in New York is that in order to reach a particular bank account the judgment creditor [in a turnover proceeding] must serve the office of the bank where the account is maintained” (*Therm-X-Chemical & Oil Corp. v Extebank*, 84 AD2d 787, 787 [1st Dept 1981]). This “separate entities” rule, of necessity, applies to attachments, since, “for purposes of attachment, among others, each branch of a bank is a separate entity, in no way concerned with accounts maintained by depositors in other branches or at the home office” (*Cronan v Schilling*, 100 NYS2d 474, 476 [Sup Ct, N.Y. County 1950], *affd* 282 App Div 940 [1st Dept 1953]; see *JSC VTB Bank v Mavlyanov*, 154 AD3d 560 561 [1st Dept 2017]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v Advanced Empl. Concepts, Inc.*, 269 AD2d 101, 101 [1st Dept 2000]; *Global Technology, Inc. v Royal Bank of Canada*, 34 Misc 3d 1209[A], 2012 NY Slip Op 50023[U], *3, 2012 NY Misc LEXIS 47, *6-7 [Sup Ct, N.Y. County, Jan. 11, 2012] [and cases cited therein]). Since the petitioner has not shown that any of the respondents maintains a bank account in New York, any account maintained by the respondents in their state of residence would be beyond the jurisdiction of this court. Nor does the petitioner present admissible evidence that an arbitration award would be rendered ineffective absent an attachment (see CPLR 7502[c]; *Matter of Mermaid Marine, Ltd. v Maritime Capital Mgt. Partners, Ltd.*, 147 AD3d 498, 499 [1st Dept 2017]; *Sullivan & Worcester LLP v Takieddine*, 73 AD3d 442, 442 [1st Dept 2010]). Therefore, to the extent that the motion may be construed as seeking an attachment of the respondents’ bank account, that relief must be denied as well.

In light of the foregoing, it is,

ORDERED that the motion is denied; and it is further,

ORDERED that the temporary restraining order set forth in the initiatory order to show cause dated and entered July 18, 2023, be, and hereby is, vacated and dissolved.

This constitutes the Decision and Order of the court.

12/21/2023

DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE